

UNPUBLISHED

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION**

SHAWNA J. NEWKIRK,

Plaintiff,

vs.

JO ANNE B. BARNHART,
Commissioner of Social Security,

Defendant.

No. C04-3079-MWB

**REPORT AND
RECOMMENDATION**

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I. INTRODUCTION

The plaintiff Shawna J. Newkirk (“Newkirk”) appeals a decision by an administrative law judge (“ALJ”) denying her applications for Title II disability insurance (“DI”) and Title XVI supplemental security income (“SSI”) benefits. Newkirk claims the ALJ erred in failing to give proper weight to the opinions of her mental health treatment team, and in failing to present a proper hypothetical question to the Vocational Expert. (See Doc. No. 7)

II. PROCEDURAL AND FACTUAL BACKGROUND

A. Procedural Background

Newkirk filed applications for DI and SI benefits in September 2001, alleging a disability onset date of June 20, 2001. (R. 107-09; 658; see R. 17). Her applications were denied on January 3, 2002, and she did not appeal. (R. 81, 84-87, 659, 660-63; see R. 17)

Newkirk filed new applications for DI and SSI benefits on September 24, 2002, again alleging a disability onset date of June 20, 2001. (R. 113-15, 665,68) Newkirk alleged she was disabled due to major depression.¹ She stated she lacked the desire to live, and was unable to get up to look for a job due to her depression. (See R. 169) Her applications were denied initially on January 13, 2003. (R. 82, 88-92, 669-73). Newkirk filed a request for reconsideration on March 12, 2003. (R. 93) Her applications were denied upon reconsideration on April 3, 2002. (R. 89, 97-100, 674-79)

On April 23, 2003, Newkirk requested a hearing (R. 101), and a hearing was held before ALJ John P. Johnson on June 10, 2004. (R. 40-80) Newkirk was represented at

¹Newkirk also noted she suffers from diabetes, asthma, back pain, and an enlarged heart. (R. 169) However, she indicated none of these ailments keeps her from working. (R. 55-56)

the hearing by attorney Blake Parker. Newkirk testified at the hearing, as did Vocational Expert (“VE”) Marian Jacobs.

On July 9, 2004, the ALJ ruled Newkirk was not entitled to benefits. (R. 14-33) Newkirk appealed the ALJ’s ruling, and on August 31, 2004, the Appeals Council denied Newkirk’s request for review (R. 9-11), making the ALJ’s decision the final decision of the Commissioner.

Newkirk filed a timely Complaint in this court on October 13, 2004, seeking judicial review of the ALJ’s ruling. (Doc. No. 2) In accordance with Administrative Order #1447, dated September 20, 1999, this matter was referred to the undersigned United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B), for the filing of a report and recommended disposition of Newkirk’s claim. Newkirk filed a brief supporting her claim on December 16, 2004. (Doc. No. 7) The Commissioner filed a responsive brief on February 7, 2005. (Doc. No. 10). Newkirk filed a reply brief on February 14, 2005. (Doc. No. 11)

The matter is now fully submitted, and pursuant to 42 U.S.C. § 405(g), the court turns to a review of Newkirk’s claim for benefits.

B. Factual Background

1. Introductory facts and Newkirk’s hearing testimony

At the time of the hearing, Newkirk was 44 years old. She was 5’4” tall and weighed around 200 pounds. She noted she had gained twenty-five or thirty pounds since her alleged onset date of June 20, 2001. (R. 44-45) She stated her depression causes her to “sit and eat trying to find satisfaction.” (R. 45) Her doctors have suggested walking but she stated she cannot push herself to walk and she has trouble leaving her house. (*Id.*)

Newkirk is not married; however, she has lived with her seventy-year-old boyfriend since at least 1991, and the couple have a son together. Their son was eighteen at the time of the hearing. (R. 46, 68) Newkirk has an unrestricted driver's license and she drives herself around. She completed high school, and then completed a one-year office assistant program for which she received a certificate from a community college. She has no problems reading, writing, or understanding the English language. (R. 46)

Newkirk's work history includes the following. She worked as a sewing-machine operator at Hawkeye Glove from September 2001 to February 2002, working ten hours per day, four days per week. She missed a lot of work due to her depression, and sometimes when she made it to work, she would sit and cry for several hours. She had unsubstantiated thoughts that someone was going to come and take her family away from her. She noted her employer was very kind and accommodating to disabled persons in his employ, but he nevertheless had to let her go because of her excessive absenteeism. (R. 46-47; see R. 170)

Newkirk worked as office assistant and then office manager at National Cash, a payday loan company, from June 20, 1999, until June 19, 2001. She worked forty hours per week, and did not get any special accommodations due to any impairment. She indicated she was fired for "misappropriating money." (R. 49; see R. 180, 170) Newkirk stated she later determined she had taken the money "to cry out for help" due to her depression. Her mother died soon after she took the job, and she became depressed and attempted suicide at one point. (R. 49-50)

She worked as a cashier-bookkeeper for Sparky's, an antique store, from June 1998 to February 1999. She worked four hours per day, five days per week. She would do the book work in the morning, take the money to the bank, and help out in the shop. She lost the job when the owner closed the business. (R. 48)

Newkirk also worked briefly as a sewing machine operator at a factory, and as a cashier/clerk at a convenience store. (R. 170)²

Newkirk indicated she worked at McDonald's for two or three weeks during the summer of 2003, but she soon became anxious and unable to go to work. She became unable to get dressed and leave the house, and she noted she sought emergency mental health treatment a couple of times during this work attempt. (R. 52-53)

Newkirk stated she has received mental health treatment for quite some time. At the time of the hearing, she was seeing a nurse practitioner for medication management every two to four weeks, and a therapist for individual counseling every other week. She also attended a group therapy session once a week. She stated she was compliant with her medication regimen and she attended her group and individual sessions regularly, as scheduled. (R. 50-52)

Newkirk predicted she would be unable to return to work. She indicated she experiences "a lack of caring," "no motivation to do anything," and she has lost interest in activities she used to enjoy, such as reading, walking, and doing cross-stitching. She lacks the concentration to get through the morning paper. She lets housework pile up because she lacks the motivation to do the work. She noted her failure to complete housework has caused problems in her relationship with her boyfriend, who is frustrated and angry with her. (R. 53-54) She also noted she does not bathe as often as she should due to her depression. (R. 68)

Newkirk described feeling paranoid, stating she sometimes will sit and "look out the window for hours at a time waiting for someone to come get [her]." (R. 54) Her

²In response to the ALJ's questioning, Newkirk described the physical exertional requirements of her various jobs (see R. 59-65, 68), but given that her disability claim is based on her depression and not her physical problems (see R. 55-56), the court will not review that testimony here.

medication helps somewhat but does not remove the feelings entirely. She indicated she still cries frequently, although not as much as she did prior to starting medication. She spends a lot of time sleeping, which is another source of conflict between her and her boyfriend. (R. 54-55) She gets up in the morning to give her diabetic dog a shot. Then she goes back to bed from 7:00 a.m. until noon or 1:00 p.m. She then gets up for a couple of hours, and then will lay down again. (R. 55) When she does get out of bed, she sits at the window for extended periods of time. She noted she has learned some methods during therapy to use in getting herself away from the window, and the methods work when she is able to use them. For example, she is supposed to sit somewhere besides the window, make herself watch television for a few minutes at a time, and try to lengthen the time she stays away from the window. According to Newkirk, she still struggles with having to look out of the window despite these treatment methods. (R. 56-57)

In the evening, Newkirk will prepare a “super simple” evening meal, and then she will lay down on the sofa. She is unable to watch an entire movie at once because she is unable to concentrate that long. She watches some television and enjoys comedies. She stated she does not engage in leisure activities because she lacks sufficient concentration. (R. 57-58) Newkirk stated when she leaves the house, her boyfriend goes with her. They go to Wal-Mart late at night, when there are fewer people around. (R. 59)

Newkirk stated she has difficulty remembering things on a daily basis. According to Newkirk, her boyfriend sometimes has to repeat a question several times before it registers with her. (R. 65)

Regarding her relationships, Newkirk stated she never had problems getting along with coworkers or supervisors. However, she was having some problems in her relationship with her boyfriend, and she indicated they likely would separate in the near

future. She noted she has lost contact with friends and family because she has problems maintaining relationships. In addition, she experiences stress if she has to be out in public, and when she has disagreements with her boyfriend. When she feels stress or pressure, she wants to isolate herself, and sometimes she has suicidal thoughts. (R. 66-67) She stated she was hospitalized overnight due to suicidal thoughts after she was fired from National Cash, but she had not been hospitalized since that time. (R. 67)

2. *Newkirk's medical history*

Newkirk claims she is prevented from working due to depression and her mental state. She specifically denied that any of her several physical complaints precludes her from working. As a result, the court will summarize only the medical evidence of record that deals with her mental capacity.

On June 17, 1994, Newkirk saw Ed D. DeHaan, M.D. with a complaint of depression “for many years.” (R. 309) Notes indicate Newkirk had been seeing a therapist every six to eight weeks for about six years, and she had been taking Elavil for perhaps the same length of time. She reported occasional suicidal thoughts, but she had not made any attempts and she had not been hospitalized or sought emergency treatment for mental health problems. She was advised to continue seeing her therapist regularly and see the doctor for reassessment in two years. (R. 309-10) Ongoing notes from doctor visits related to various physical complaints indicate she continued to take Elavil 50 mg. at bedtime for the next few years, and she carried on ongoing diagnosis of depression. (See R. 296-97, dated June 7, 1996)

Newkirk apparently was switched to Zoloft at some point, with office notes from October 22, 1996, indicating a refill of Zoloft at 100 mg. daily. (R. 293) She also was taking Amitriptyline at that time. (See *id.*) Her Zoloft and Amitriptyline were refilled on

February 18, 1997 (R. 292). Newkirk saw Dr. DeHaan for a medication review on April 9, 1997. The doctor's office notes from that visit indicates Newkirk had been started on the Amitriptyline by a Dr. Berryhill in 1992, both to help her sleep and to treat depression. The same note indicates the Zoloft had been prescribed by a Dr. Szeibel for Newkirk's depression. (See R. 291) As of the April 1997 visit, Dr. DeHaan indicated Newkirk's depressive symptoms were under good control and she was doing "very well," despite the fact that she had had a very stressful year, including the deaths of three very close relatives. Dr. DeHaan refilled her Zoloft and Amitriptyline, although he lowered the Amitriptyline dosage to see if Newkirk could use the drug just to help her sleep. (*Id.*)

Doctor's notes from a routine physical on September 18, 1997, indicate Newkirk had a history of depression, but she was "doing well with all of her problems." (R. 290) Doctor's notes from January 15, 1998, indicate Newkirk continued to do well on Zoloft 50 mg. daily, a dosage she had been taking "for quite some time." (R. 288) Physician's Assistant Jennifer Schreier suggested a switch to Wellbutrin, which P.A. Schreier thought would help Newkirk stop smoking in addition to treating her depression. They agreed on a regimen for Newkirk to discontinue the Zoloft and begin taking Wellbutrin. (R. 287-88) At a follow-up visit on February 12, 1998, for recently-diagnosed type II diabetes mellitus, P.A. Schreier noted Newkirk had lost twelve pounds and was getting a good response from the Wellbutrin, which was refilled. (R. 286) As of March 25, 1998, Newkirk was continuing to do well managing her diabetes, and was doing well with her depression and smoking cessation on the Wellbutrin. (R. 286) Her Wellbutrin prescription was refilled on June 25, 1998 (R. 285).

In September 1998, Newkirk requested a decrease in her Wellbutrin and Amitriptyline dosages for financial reasons, but it is not clear the dosage was adjusted. (R. 284) Records indicate she was directed to continue taking Wellbutrin SR 150 mg.

twice daily, and her prescription was refilled. (R. 283) Her Amitriptyline dosage was decreased, however, and notes indicate she was doing well at the lower dosage. (*Id.*) On September 24, 1998, Newkirk reported she was “doing okay with Amitriptyline but she needs a higher dose to treat her depression but when she takes a little bit more of it she gets too sleepy.” (*Id.*) She stated the Wellbutrin was too expensive, and she did not feel it had helped her quit smoking, so she was switched to a trial of Prozac. (*Id.*)

The Prozac was refilled regularly through September 1, 1999. (See R. 278, 280, 283). However, as of January 7, 2000, doctor’s notes indicate Newkirk was “currently on no antidepressants whatsoever.” (R. 276) She reported doing well despite her mother’s death the previous year. (*Id.*) She continued to maintain excellent control of her diabetes and was motivated to increase her diet and exercise. (R. 275-76)

On May 17, 2000, Newkirk called P.A. Schreier to report a recurrence of her depressive symptoms. She was having difficulty sleeping, feeling tired a lot, eating more to compensate for not feeling well, and having some anhedonia and mood changes. Newkirk asked to resume Prozac, and P.A. Schreier gave her a prescription for Prozac, noting Newkirk had done well on the medication previously. (R. 269) At a follow-up visit on June 16, 2000, Newkirk reported feeling better, although not 100% improved. Office notes indicate Newkirk may have been suffering from some depression in connection with her mother’s death and Newkirk’s subsequent weight gain. Her Prozac was refilled for two months. (R. 258-59)

At a follow-up visit on July 17, 2000, Newkirk was restarted on Amitriptyline at bedtime to help her sleep. She was complaining of some leg and buttock pain and was diagnosed with probable nerve root irritation. (R. 266-67) At her next visit on August 4, 2000, she reported quite a bit of improvement in her leg pain and she was sleeping well

with the Amitriptyline. She obtained a refill of her Prozac. (R. 267) Records indicate she continued to obtain Prozac refills monthly.

Newkirk saw P.A. Schreier for follow-up of her diabetes on May 23, 2001. In her notes, P.A. Schreier indicated Newkirk was “well known to [her] with known depression.” (R. 253) She refilled Newkirk’s prescription for Prozac 20 mg. daily. (*Id.*)

On June 20, 2001, Newkirk checked herself in for voluntary psychiatric hospitalization after she was fired from her job at National Cash. She gave a history of worsening depressive symptoms over the preceding few months, with recurrent thoughts of suicide and a plan to cut her wrists, overdose on pills, or crash her car. She reported being on Prozac for several months, but could not relate the dosage. She stated the Prozac helped her somewhat. She was diagnosed with major depressive disorder, recurrent episode severe, without psychotic features; dysthymic disorder; and personality disorder NOS. Her GAF was assessed at 35, indicating severe symptoms. She remained in the hospital overnight, and was discharged the next day with an increased Prozac dosage and instructions to follow up with the local mental health center. (R. 355-59)

Newkirk thereafter began a long-term treatment relationship with North Central Iowa Mental Health Center. Beginning soon after her hospitalization, Newkirk began receiving regular counseling from social worker Kyle McCard, under the supervision of Richard Ajayi, M.D. The record includes treatment notes covering the period from June 21, 2001, through June 8, 2004. (R. 355-80, 425-72, 533-45, 547-48, 571-73, 598-649) During her long-term treatment, Newkirk tried several different antidepressant medications, including Prozac, Effexor, Celexa, Remeron, and Zyprexa.

On August 29, 2001, Newkirk reported that she had “job applications out all over,” and she was frustrated about all the time on her hands and her inability to find work. Her current GAF was assessed at 50. (R. 367) When Newkirk saw Dr. Ajayi on

September 11, 2001, Newkirk was not doing well and was observed to be withdrawn and speaking in monotone. She reported sitting and moping around a lot and a lack of motivation to do anything. She also reported feeling hopeless and worthless with some suicidal thoughts but no plan. (R. 366) She saw counselor McCard on September 12, 2001, and reported a very slight improvement on Celexa. She stated she did not read much because she was unable to concentrate. She was encouraged to find ways to use her time. (R. 364) On October 9, 2001, she showed improvement and stated she “had found some employment several weeks ago so she had something to do.” She was getting along well with her boyfriend and their son, and she felt things were beginning to improve for her. (R. 362-63)

Newkirk underwent a consultative evaluation by Joseph X. Latella, D.O. in November 2001. (R. 381-85) Dr. Latella noted Newkirk had some minimal physical limitations, but he made no assessment of her mental condition other than to note she carried a diagnosis of “[m]ajor depression by history.” (R. 382)

Dee E. Wright, Ph.D. reviewed the record and completed a Psychiatric Review Technique form (R. 386-99) and a Mental Residual Functional Capacity Assessment form (R. 400-04) on December 19, 2001. He found Newkirk would be moderately limited in the ability to carry out detailed instructions, and maintain attention and concentration for extended periods, but she otherwise would have no work-related limitations. He found the record evidence indicated Newkirk was not “currently manifesting severe limitations of function with social interaction”; she possessed “adequate expressive and receptive language skills”; and she could “sustain short-lived, superficial interaction with others in appropriate ways when she [was] motivated to do so.” (R. 404) He further found Newkirk had no “severe limitations of function with self care or other activities of daily living from a psychological perspective,” noting she did her own laundry and chores,

drove a car, and “engage[d] in independent, goal oriented activity when . . . motivated to do so.” (*Id.*) He found her to have a medically-determinable mental impairment of “Depressive Disorder, NOS,” which did not meet Listing criteria. (*Id.*)

By December 2001, Newkirk was reporting fatigue from working nine hours per day, but she showed good insight and judgment and Dr. Ajayi noted her depression was in partial remission. (R. 471) On January 3, 2002, Newkirk reported feeling much better with continued improvement. (R. 470) On January 10, 2002, she reported recurrence of some depressive symptoms arising from conflict between her boyfriend and their son, “primarily over her attention.” (R. 468) She noted her medications were helping her personally, however, and she opined that her legal problems at National Cash might have arisen from long-term depression that she had failed to recognize at the time. (*Id.*)

Newkirk saw Dr. Ajayi on February 14, 2002, and reported increasing feelings of anxiety brought on by the discordant relationship between her boyfriend and their son. She also stated her work was very stressful, and she reported “more dreams of death and dying.” (R. 466) The doctor assessed her with a breakthrough of depressive symptoms, and he increased her Celexa and Effexor dosage. (*Id.*) At a visit with counselor McCard on March 5, 2002, Newkirk reported some improvement at home. She had lost her job but felt this was unjustified and she planned to apply for unemployment benefits. Her current GAF was assessed at 45. (R. 462)

Over the next few months, Newkirk continued to evidence depressive symptoms, noting some improvement from time to time followed by a recurrence of symptoms. (*See, e.g.*, R. 446-60) She reported strange dreams and thoughts, but these seemed to improve with medication. Overall, her progress in counseling sessions was noted to be minimal throughout April, May, June, July, and August 2002; however, Dr. Ajayi assessed her

depression to be in remission and he noted, on June 27, 2002, that Newkirk was “bright and vivacious.” (R. 443)

Dr. Ajayi apparently left the mental health center in September 2002 (*see* R. 439, 441), and in August 2002, Newkirk began seeing Nurse Practitioner Joan Kitten for medication follow-ups, and Timi Jordison, Ph.D. for counseling. (*See* R. 437-38) Dr. Jordison noted Newkirk was attending a women’s support group, which Newkirk stated was helpful to her. (R. 435) As of September 2002, Newkirk was taking Effexor XR 225 mg. daily and Remeron 45 mg. at bedtime. (R. 434) When Newkirk saw Dr. Jordison on September 25, 2002, she reported doing relatively well overall, although she had intermittent episodes of feeling worthless and hopeless. Her current GAF was assessed at 50. (R. 432) A status report dated September 28, 2002, indicates Newkirk’s prognosis was considered to be “[f]air to good,” and doctors recommended she continue counseling sessions through July 2003. (R. 430-31)

At her session with Dr. Jordison on October 9, 2002, Newkirk expressed frustration because of her inability to find employment. She stated she had been putting in applications, and she was considering the possibility of some additional schooling. Her current GAF was assessed at 55. (R. 428-29) At her next session on October 30, 2002, Newkirk reporting feeling better, more relaxed, and less stressed. She had been able to cope with a problem with her car that, in the past, would have made her feel extremely agitated, anxious, and depressed. She stated her depressive symptoms were still present but not as bad as they had been in the past. Newkirk indicated she might want to obtain more schooling and become a counselor herself, but she was going to wait until her son went away to college. (R. 425-26)

Dr. Jordison completed a reevaluation of Newkirk’s progress, prognosis, and plan on December 11, 2002. She noted no change since Newkirk’s previous evaluation.

Newkirk remained motivated to continue working in therapy, although she opined she probably would never be completely free of depression. Her goal was to live a satisfactory life despite her ongoing depression. She carried a continuing diagnosis of major depression, recurrent, and dysthymic disorder. Her current GAF was assessed at 50, with 50 being her highest GAF over the previous year. (R. 541-44)

Dee E. Wright, Ph.D. completed another review of the record evidence in December 2002. (R. 493-512) On the forms, Dr. Wright indicated Newkirk would have moderate limitations in the ability to carry out detailed instructions, maintain attention and concentration for extended periods, and respond appropriately to changes in the work setting, but otherwise she would have no work-related limitations. Dr. Wright's written comments include, *inter alia*, the following:

The medical evidence of record also contains a work performance assessment from a previous employer. . . . The work performance assessment indicates that the claimant did exhibit some difficulties with sustained attention and concentration. The claimant was employed as a labor[er] from 9/25/2001 through 2/28/2002. The claimant also exhibit[ed] some difficulties adhering to schedules. She did not require more than average amounts of supervision. Her attendance was her greatest problem. The claimant was able to perform simple tasks and could adapt [to] changes in the work place when necessary.

The preponderance of the evidence in file would support moderate cognitive restrictions of function of the claimant's case. The claimant does exhibit variable sustained attention and concentration. The claimant would have difficulty consistently performing extremely complex cognitive activity that would require prolonged attention to minute details and rapid shifts in alternating attention. Despite this restriction, the claimant is able to sustain sufficient concentration and

attention to perform non complex, repetitive, and routine cognitive activity without severe limitation of function.

The evidence in file does not indicate the claimant is currently exhibiting severe limitations of function with social interaction. The claimant has exhibit[ed] some evidence of social withdrawal; but the claimant can interact with others appropriately when it is in her interest to do so. The claimant can sustain short-lived superficial interaction with others. She is able to travel independently in her environment and does not exhibit severe difficulties [dealing] with the public at large.

The evidence in file does not indicate the claimant is currently exhibiting severe limitations of function with self care or other activities of daily living from a psychological perspective. The claimant is able to travel independently in her environment. The claimant is able to operate a motor vehicle without apparent psychological difficulties. The claimant is able to engage in independent, goal oriented activity. The claimant currently possesses sufficient executive functioning to act in her own best interest.

(R. 511-12) On April 2, 2003, David A. Christiansen, Ph.D. reviewed all the evidence of record and concurred in Dr. Wright's assessment. (R. 493)

When Newkirk saw Nurse-Practitioner Kitten on March 10, 2003, for a medication follow-up, Newkirk reported looking forward to the future for the first time in years. She was doing well on her current medication regimen, which included Zyprexa 5 mg. at bedtime, Effexor XR 150 mg. twice daily, and Remeron 45 mg. at bedtime. Ms. Kitten noted Newkirk's mood was the best she had seen, although she continued to be slightly depressed. (R. 535)

At Newkirk's case review on April 1, 2003, she was noted to be showing improvement in her mood and becoming more hopeful about the future. Her prognosis

was noted to be good. The staff at the mental health center recommended she continue therapy through February 2004. (R. 533-34)

Absent from the record are any treatment notes from April 2003 through September 2003. Ongoing notes after that time seem to indicate Newkirk continued with her treatment, and it is unknown why records are missing for this time period.

As of September 9, 2003, Newkirk was exhibiting continuing depressive symptoms, including lack of motivation and problems sleeping. (R. 572) Her cardiologist apparently put her on Provigil, which helped her motivation and reduced her feelings of anxiousness. (R. 644) On October 14, 2003, Newkirk reported ongoing symptoms of lack of motivation and “blah” feelings, but otherwise she reported doing quite well. (R. 639)

When Newkirk saw Dr. Jordison on October 22, 2003, she expressed what the doctor termed as “irrational beliefs” and feelings of guilt. (R. 637) Newkirk indicated she did not believe she could return to full-time work, noting thoughts of her job at McDonald’s caused her a great deal of anxiety. She asked the doctor for “a note that expressed the fact that her mental illnesses would cause it to be very difficult for her to work at a stressful job at this point, and that if she is able to find a low stress job in a positive environment it would be beneficial to start her at between 5 and 8 hours a week.” (*Id.*) Newkirk stated she still liked to work and wanted to work. (R. 636)

At a medication follow-up on November 4, 2003, Newkirk reporting feeling more motivated and sleeping better, with some overall improvement. (R. 633) On November 5, 2003, Dr. Jordison noted Newkirk was “remaining stable.” Newkirk reported doing some volunteer work at an animal shelter, which Dr. Jordison observed was therapeutic and indicative of the fact that Newkirk might be able “to do some type of low stress work at some point.” (R. 630-31)

At her next visit with Dr. Jordison on November 19, 2003, Newkirk was much more tearful and depressed. Her son was experiencing some difficulties at school and she was concerned about him. In addition, she was facing testing for pre-cancerous indications on her esophagus, and she expressed fear and anxiety about her situation. She noted her depression was not as bad as it had been at some points in the past, but she still viewed her depression as a chronic condition. Dr. Jordison assessed Newkirk as having depression with psychosis, dysthymia, and anxiety disorder, with a current GAF of 45. (R. 627-68)

Dr. Jordison completed a case review regarding Newkirk on December 17, 2003. She noted Newkirk continued to feel depressed a great deal of the time, although she also continued to make some progress in developing cognitive coping skills. She noted Newkirk was “very responsible in taking her medication, and attending her treatment sessions,” including the depression support group. (R. 618) Dr. Jordison recommended Newkirk continue with her ongoing therapy through September 2004. (R. 619) Newkirk’s GAF assessment remained at 50. (R. 618)

In January 2004, Dr. Jordison wrote a brief opinion letter indicating Newkirk was, at that time, unable to maintain employment and she had no means of income, adding to Newkirk’s depression and anxiety. (R. 547) Nurse-Practitioner Kitten concurred that Newkirk was “currently unable to work.” (R. 438) Newkirk’s probation officer noted Newkirk’s inability to work resulted in an inability to pay court-ordered restitution, “only adding to her depression and anxiety.” (R. 546)

At Newkirk’s therapy session on January 21, 2004, Dr. Jordison noted Newkirk was relatively stable overall, continuing to try to cope with her ongoing depression as effectively as she could. Her GAF was improved at 60. (R. 610-11) Newkirk continued to show some improvement at her next session on February 4, 2004. She was looking

into alternative housing because of relationship problems with her boyfriend, and she was handling some stressors in her life reasonably well. She continued to report feelings of depression and difficulty being assertive. Her GAF remained at 60. (R. 609)

At her next session on February 18, 2004, Newkirk was tearful and anxious. She talked about suicidal thoughts but had no real plan, and she agreed she would seek hospitalization before she took any action to harm herself. She and her boyfriend continued to have problems and Newkirk was internalizing some of his negative comments, exacerbating her depression. Her current GAF was assessed at 45. (R. 604-05)

Newkirk's mood had improved by her March 3, 2004, session. She felt better and was less tearful, and she expressed better ability to control how she was feeling. Her current GAF was assessed at 60. (R. 601-02)

On May 12, 2004, Dr. Jordison wrote a brief opinion letter regarding Newkirk's condition. The doctor stated as follows:

[Newkirk] continues to work with me in individual therapy at North Central Iowa Mental Health Center. She continues to work on ways of coping with depression and some symptoms of anxiety. [Newkirk] is very cooperative and works hard in therapy. She also attends group therapy once a week.

At this time, it still would not be recommended that [Newkirk] try to hold a full-time job. She would also have a very difficult time holding a part-time job. She has tried this, and her emotional state worsened. . . .

(R. 598)

On June 8, 2004, Nurse-Practitioner Kitten completed a Mental Impairment Questionnaire regarding Newkirk, cosigned by Uzoma Okoli, M.D. on behalf of North Central Iowa Mental Health Center. (R. 650-57) Information on the form was based on

Newkirk's treatment at the facility from June 20, 2001, through June 8, 2004. (See R. 650) The form indicates Newkirk carried diagnoses of Major Depressive Disorder with psychotic features, with a current GAF of 55, and highest GAF in the previous year of 55-60. (*Id.*) Newkirk suffered from symptoms including sleep disturbance, mood disturbance, emotional lability, social withdrawal or isolation, decreased energy, anhedonia or pervasive loss of interests, feelings of guilt/worthlessness, difficulty thinking or concentrating, intrusive recollections of a traumatic experience, and generalized persistent anxiety. (R. 650-51) Newkirk was indicated to be "very compliant with individual and group therapy and medication management," and she worked toward goals although she continued to feel depressed most of the time. (R. 651) It was estimated Newkirk would have to miss work more than three times monthly due to her mental impairments or treatment. (R. 653)

It was estimated Newkirk would exhibit poor or no ability to maintain regular attendance and be punctual within customary, usually strict tolerances; complete a normal workday and workweek without interruption from psychologically based symptoms; deal with normal work stress; travel in an unfamiliar place; or deal with the stress of semi-skilled and skilled work. (R. 654-55) She was estimated to have only fair ability to perform numerous other work-related functions, including, among others, maintaining attention and concentration, and understanding, remembering, and carrying out detailed instructions. (R. 653-55) Newkirk was noted to be "extremely sensitive to criticism." (R. 654) Her work attempt at McDonald's resulted in an inability to go into the building, and she would sit in the car and cry. (*Id.*) It was estimated Newkirk would have "continual" episodes of deterioration or decompensation in work or work-like settings that would cause her to withdraw from the situation or to experience exacerbation of signs and symptoms. (R. 656)

3. Vocational expert's testimony

The ALJ clarified for VE Marian Jacobs that Newkirk's work as a sales attendant at Sparky's, and cashier at a convenience store, car wash, and Wal-Mart, were performed at the substantial, gainful activity level. (R. 69-70) The VE completed a past work activity chart regarding Newkirk's work (see R. 246), which was admitted into evidence at the hearing. (R. 71-72) The chart indicates Newkirk's past relevant work was performed at the unskilled and semi-skilled levels, with light and sedentary physical demands. According to the exhibit, the VE indicated Newkirk would have acquired transferable skills in financial transactions, clerical machine operation, oral communication, and record keeping. (R. 246)

The ALJ posed the following hypothetical question to the VE:

My first assumption is that we have an individual who is 44 years old. She was 41 years old as of the alleged onset date of disability. She's a female. She has a high school education plus additional training as an office assistant, and she has the following impairments. She has a history of a back injury, diabetes mellitus, chronic obstructive pulmonary disease with asthma, obesity, cardio-myopathy, hypertension, hyperlipidemia, major depressive disorder, and dysthymic disorder. And as a result of a combination of those impairments she has the Residual Functional Capacity as follows. She could not lift more than 20 pounds, routinely lift 10 pounds. Walking, standing of at least six hours out of an eight-hour day. Sitting of at least six hours out of an eight-hour day with only occasional bending, stooping, squatting, kneeling, crawling, or climbing. This individual should not be exposed to excessive heat, humidity, cold, dust, or fumes. She should not work at unprotected heights. She is not able to do very complex or technical work, but is able to do more than simple, routine, repetitive work that does not require constant close attention to detail. She does require occasional

supervision. And she should not work at more than a regular pace and that's using three speeds of pace being fast, regular, and slow. And she should not work at more than a mild to moderate level of stress. Would this individual be able to perform any job she previously worked at, either as she performed it or as it is generally performed within the national economy?

(R. 72-73) The VE replied the hypothetical individual could perform Newkirk's past work as sewing machine operator, sales attendant, and cashier II. (R. 73)

The ALJ then asked the VE to consider the same individual, but with the following revised Residual Functional Capacity:

This individual could not lift more than 20 pounds, routinely lift 10 pounds; stand for more than [one] hour at a time; sit for more than a half hour at a time; pretty [sic] walk more than four to five blocks at a time. With no excessive heat, humidity, dust, fumes, or smoke. She's not able to do very complex or technical work, but is able to do more than simple, routine, repetitive work that does not require close attention to detail or use of independent judgment for decision-making. She does require occasional supervision. She should not work at more than a regular pace or more than a mild level of stress. Would this individual be able to perform any job she previously worked at, either as she performed it or as it is generally performed within the national economy?

(R. 73-74) The VE noted the individual's past jobs of sewing machine operator, cashier II, and sales attendant would require "up to a moderate stress level," and therefore, the hypothetical's limitation on stress level would preclude the individual's past relevant work. The individual also would not have transferable skills to other work within that hypothetical due to the stress limitation, nor could she perform the full range of unskilled work due to the sitting and standing limitations. (R. 74-75)

However, the VE opined the hypothetical individual would be able to perform “the sedentary, unskilled job of call-out operator,” which “allows for a sitting, standing flexibility in the sense that one uses a telephone”; the sedentary, unskilled job of charge account clerk; and the light, unskilled job of office helper, which would “allow for some sitting, standing flexibility.” (R. 75-76) The VE cited statistics indicating each of the suggested jobs exists in significant numbers in the local and national economies. (*Id.*) The VE explained that the light-to-moderate stress level for the office helper would be dependent upon the particular work site and demands of certain tasks, but in the VE’s opinion, the job’s stress would be mild to moderate, which the VE found acceptable under the hypothetical. (R. 78-79)

Newkirk’s attorney asked the VE to consider the physical limitations posed by the ALJ in his first hypothetical, but then to consider the following mental residual functional capacity that was suggested by Newkirk’s therapist and supervising physician:

What they’ve indicated in terms of work ability for unskilled work – and I’m just going to use the “fair,” with fair being defined as, the ability to function in area is seriously limited but not precluded. And then poor or none category as being meaning of – poor or none to mean no useful ability to function. So I want you to assume within the judge’s first hypothetical that in relating to unskilled work the hypothetical person would have the fair ability to maintain attention for no more than a two-hour segment. A poor ability to maintain regular attendance. A fair ability to work in coordination with others. A fair ability to make simple work-related decisions. A poor ability to complete a normal workday and work week. A fair ability to maintain consistent pace. Excuse me. A fair ability to ask simple questions or request assistance. A fair ability to make routine changes within the workplace. A poor ability to deal with normal work stress. Then relating to skilled or semi-skilled work the person would have a fair

ability to understand and remember detailed instructions. A fair ability to carry out detailed instructions. A fair ability to set realistic goals or make plans independently of others. And a poor ability to deal with stress of semi-skilled and skilled work. With those changes to the judge's first hypothetical, would she be able – this hypothetical person be able to perform the jobs that you initially identified?

(R. 76-77)

The VE replied the hypothetical individual would not be able to perform any of the identified jobs, and would not be capable of performing other jobs available in the national or local economies. (R. 77) The particular characteristics precluding work would include the poor attendance, poor completion, and lack of stress. (R. 78) The VE indicated the answer would be the same if those mental capabilities were added to the ALJ's second hypothetical question. (*Id.*)

The VE noted job placement would be difficult for an individual who met the mental functional criteria stated in the hypothetical posed by Newkirk's attorney, and a sheltered work environment might be appropriate, at least "to begin with." (R. 79)

4. The ALJ's decision

The ALJ found Newkirk to have "the following severe impairments":

Type II diabetes mellitus, non-ischemic cardiomyopathy, asthma and environmental allergies, status post successful immunotherapy through rapid desensitization on April 16, 2001[;] a history of a possible tendon rupture in her right foot in 2003[;] a history of compression fracture of L1 and limbus deformity at L4 secondary to a fall on December 10, 1992[;] gastroesophageal reflux disease (GERD) with severe pre-pyloric ulcers, a fatty infiltration in her liver, a history of cholecystitis, status post [] laparoscopic cholecystectomy on

June 12, 1996[;] obesity, a recurrent major depressive disorder, dysthymia, and a non-specified personality disorder.

(R. 31, ¶ 3) However, the ALJ found none of these impairments, singly or in combination, met the Listing requirements. (*Id.*)

He found Newkirk to have the following physical and mental residual functional capacity:

The claimant retains the residual functional capacity to lift and carry up to 20 pounds occasionally and ten pounds frequently. She can sit for 30 minutes at a time. She can stand for one hour at a time. She can walk four to five blocks at a time. She cannot tolerate exposure to excessive amounts of heat, humidity, dust, cold, or fumes. She cannot work in exposed heights. She is not able to perform very complex-technical work, but can perform more than simple, routine, work that does not require constant close attention to detail. She cannot use independent judgment. She requires occasional supervision. She cannot work at more than a regular pace. She cannot tolerate more than a mild amount of work-related stress. (20 CFR 404.1545 and 416.945)

(R. 32, ¶ 5)

The ALJ found Newkirk could not return to any of her past relevant work and she had acquired no work skills transferable to skilled or semi-skilled jobs, but she could perform unskilled work including call-out operator, charge account clerk, and office helper. (R. 32, ¶¶ 6, 9, & 10)

The ALJ found Newkirk had not presented evidence that warranted reopening her prior application, and he concluded she was not disabled. The ALJ found Newkirk's subjective complaints regarding the severity and intensity of her symptoms not to be credible. In so finding, the ALJ noted, "No one doubts that the claimant experiences some depression." (R. 29) However, he found her claim of total disability was not

supported by the objective medical evidence, the consultative evaluations, and her inconsistent statements to doctors, therapists, and others:

First, the claimant's allegation is not supported by the objective medical evidence. As conceded by the claimant at the hearing, her physical impairments are not disabling. The claimant has only been hospitalized once for her depression, and the hospitalization lasted only over night. Since then, all of her psychiatric treatment has been on an outpatient basis. The claimant has never attempted suicide or experienced a psychotic break. The treatment records indicate that Dr. Ajayi stabilized the claimant's depression with medical treatment by May 2002, and that her symptoms have been in the moderate range of severity since. The claimant had one brief period of decompensation when she was afraid that she might have cancer. . . . However, her symptoms lessened as soon as she found out that she did not. . . . Second, the claimant's allegation is not supported by the determinations of the state agency medical consultants who evaluated her. Third, the claimant was convicted of felony theft, a crime involving dishonesty. Fourth, the claimant represented to her treating psychiatrist that she was married. . . . She represented to her therapist that she had a common-law marriage relationship with her boyfriend. . . . At the hearing, she testified that she had never been married and that she merely lives with her boyfriend. Fifth, the claimant testified that she tried to commit suicide after she was fired for stealing from her employer. She later testified that she was hospitalized for suicidal ideation. Sixth, the claimant is currently totally dependent on her boyfriend for financial support. On December 31, 2003, the claimant reported that her boyfriend had threatened to throw her out of the house if she did not start financially contributing to the household. . . . On February 4, 2004, she reported that she continued to work with Social Security so that she could make a financial contribution to the household. . . . On March 3, 2004, she told her therapist that she wanted the Social Security case to

be resolved because this may give her an option as to whether she stays with her boyfriend or not. . . . Seventh, on November 14, 2001, when the claimant was seeking disability benefits based on her physical impairments, she told the consultative examiner that she could not squat. . . . Later, on December 6, 2002, when she was seeking disability benefits primarily because of her mental impairments, she could squat. . . . Finally, the claimant testified that she does not do much around the house except when she was having a good day. On February 4, 2002, she reported to her therapist that she was not delinquent in doing the housework and completed a “things to do” list every week. . . .

(R. 29-30, citations omitted)

The ALJ specifically discounted the opinions of Newkirk’s treating mental health professionals. He indicated Dr. Jordison’s opinions were “entitled to little weight” because they appeared to be based on Newkirk’s self-reporting, and her opinions regarding Newkirk’s inability to work were “not consistent with [the doctor’s] extensive treatment records covering [Newkirk].” (R. 25) He further found both Dr. Jordison’s and Nurse-Practitioner Kitten’s “opinions are not medical opinions and are therefore not entitled to much deference.” (*Id.*, citing *Krogmeier v. Barnhart*, 294 F.3d 1019, 1023 (8th Cir. 2002)).

The ALJ discounted the mental health questionnaire completed by Nurse-Practitioner Kitten, co-signed by Dr. Okoli, because of a lack of any evidence that Dr. Okoli had any type of treatment relationship with Newkirk, and because he found the responses on the form to be inconsistent with Newkirk’s treatment records, which the ALJ described as showing the following:

These records indicate that the claimant’s most severe psychological symptoms occurred from June 2001 to May 2002. During this time, the claimant managed to work full

time, although she eventually lost her job due to excessive absenteeism. The treatment records indicate that the claimant's psychological symptoms improved in May 2002 to the moderate range of severity and have almost constantly remained in the moderate range until the present. The treatment records do not record constant episodes of decompensation. Finally, their opinion is inconsistent with the fact that the claimant performed volunteer work at the animal shelter in the fall of 2003.

(R. 26)

Finally, the ALJ found the opinions of Newkirk's treating sources "ignore[d] the basis realities of the claimant's situation," as follows:

Obtaining disability benefits would enable the claimant to be financially independent of her common law husband (or boyfriend), and would allow her to leave him if she chooses to. She is currently completely dependent on him for financial support, and must remain with him, despite having problems with him. . . . Her ability to obtain suitable employment has been seriously undermined by her theft conviction. Consequently, obtaining disability benefits may be her best chance at realizing financial independence.

(R. 26)

With regard to Newkirk's mental abilities, the ALJ concluded Newkirk would have "mild restrictions in her activities of daily living, mild difficulties in maintaining social functioning, and mild to moderate difficulties in maintaining concentration, persistence, or pace." (*Id.*) He found her to have no episodes of decompensation of extended duration. (*Id.*)

III. DISABILITY DETERMINATIONS, THE BURDEN OF PROOF, AND THE SUBSTANTIAL EVIDENCE STANDARD

A. Disability Determinations and the Burden of Proof

Section 423(d) of the Social Security Act defines a disability as the “inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months.” 42 U.S.C. § 423(d)(1)(A); 20 C.F.R. § 404.1505. A claimant has a disability when the claimant is “not only unable to do his previous work but cannot, considering his age, education and work experience, engage in any other kind of substantial gainful work which exists . . . in significant numbers either in the region where such individual lives or in several regions of the country.” 42 U.S.C. § 432(d)(2)(A).

To determine whether a claimant has a disability within the meaning of the Social Security Act, the Commissioner follows a five-step sequential evaluation process outlined in the regulations. 20 C.F.R. §§ 404.1520 & 416.920; *Dixon v. Barnhart*, 353 F.3d 602, 605 (8th Cir. 2003); *Kelley v. Callahan*, 133 F.3d 583, 587-88 (8th Cir. 1998) (citing *Ingram v. Chater*, 107 F.3d 598, 600 (8th Cir. 1997)). First, the Commissioner will consider a claimant’s work activity. If the claimant is engaged in substantial gainful activity, then the claimant is not disabled. 20 C.F.R. § 404.1520(4)(i).

Second, if the claimant is not engaged in substantial gainful activity, the Commissioner looks to see “whether the claimant has a severe impairment that significantly limits the claimant’s physical or mental ability to perform basic work activities.” *Dixon*, 353 F.3d at 605; accord *Lewis v. Barnhart*, 353 F.3d 642, 645 (8th Cir. 2003). The United States Supreme Court has explained:

The ability to do basic work activities is defined as “the abilities and aptitudes necessary to do most jobs.” . . . Such abilities and aptitudes include “[p]hysical functions such as walking, standing, sitting, lifting, pushing, pulling, reaching, carrying, or handling”; “[c]apacities for seeing, hearing, and speaking”; “[u]nderstanding, carrying out and remembering simple instructions”; “[u]se of judgment”; “[r]esponding appropriately to supervision, co-workers, and usual work situations”; and “[d]ealing with changes in a routine work setting.”

Bowen v. Yuckert, 482 U.S. 137, 140-42, 107 S. Ct. 2287, 2291, 96 L. Ed. 2d 119 (1987) (citing 20 C.F.R. §§ 404.1521(b), 416.921(b)).

Third, if the claimant has a severe impairment, then the Commissioner will consider the medical severity of the impairment. If the impairment meets or equals one of the presumptively disabling impairments listed in the regulations, then the claimant is considered disabled, regardless of age, education, or work experience. 20 C.F.R. § 404.1520; *Kelley*, 133 F.3d at 588.

Fourth, if the claimant’s impairment is severe, but it does not meet or equal one of the presumptively disabling impairments, then the Commissioner will assess the claimant’s residual functional capacity (“RFC”) to determine the claimant’s “ability to meet the physical, mental, sensory, and other requirements” of the claimant’s past relevant work. 20 C.F.R. §§ 404.1520(4)(iv); 404.1545(4); see *Lewis*, 353 F.3d at 645-46 (“RFC is a medical question defined wholly in terms of the claimant’s physical ability to perform exertional tasks or, in other words, ‘what the claimant can still do’ despite his or her physical or mental limitations.”) (citing *Bradshaw v. Heckler*, 810 F.2d 786, 790 (8th Cir. 1987); 20 C.F.R. § 404.1520(e) (1986)); *Dixon, supra*. The claimant is responsible for providing evidence the Commissioner will use to make a finding as to the claimant’s RFC, but the Commissioner is responsible for developing the claimant’s

“complete medical history, including arranging for a consultative examination(s) if necessary, and making every reasonable effort to help [the claimant] get medical reports from [the claimant’s] own medical sources.” 20 C.F.R. § 404.1545(3). The Commissioner also will consider certain non-medical evidence and other evidence listed in the regulations. *See id.* If a claimant retains the RFC to perform past relevant work, then the claimant is not disabled. 20 C.F.R. § 404.1520(4)(iv).

Fifth, if the claimant’s RFC as determined in step four will not allow the claimant to perform past relevant work, then the burden shifts to the Commissioner “to prove that there is other work that [the claimant] can do, given [the claimant’s] RFC [as determined at step four], age, education, and work experience.” Clarification of Rules Involving Residual Functional Capacity Assessments, etc., 68 Fed. Reg. 51,153, 51,155 (Aug. 26, 2003). The Commissioner must prove not only that the claimant’s RFC will allow the claimant to make an adjustment to other work, but also that the other work exists in significant numbers in the national economy. *Id.*; 20 C.F.R. § 404.1520(4)(v); *Dixon, supra*; *Pearsall v. Massanari*, 274 F.3d 1211, 1217 (8th Cir. 2001) (“[I]f the claimant cannot perform the past work, the burden then shifts to the Commissioner to prove that there are other jobs in the national economy that the claimant can perform.”) (citing *Cox v. Apfel*, 160 F.3d 1203, 1206 (8th Cir. 1998)); *Nevland v. Apfel*, 204 F.3d 853, 857 (8th Cir. 2000). If the claimant can make an adjustment to other work that exists in significant numbers in the national economy, then the Commissioner will find the claimant is not disabled. If the claimant cannot make an adjustment to other work, then the Commissioner will find the claimant is disabled. 20 C.F.R. § 404.1520(r)(v).

B. The Substantial Evidence Standard

The court reviews an ALJ's decision to determine whether the ALJ applied the correct legal standards, and whether the factual findings are supported by substantial evidence on the record as a whole. *Hensley v. Barnhart*, 352 F.3d 353, 355 (8th Cir. 2003); *Banks v. Massanari*, 258 F.3d 820, 823 (8th Cir. 2001) (citing *Lowe v. Apfel*, 226 F.3d 969, 971 (8th Cir. 2000)); *Berger v. Apfel*, 200 F.3d 1157, 1161 (8th Cir. 2000) (citing 42 U.S.C. § 405(g); *Richardson v. Perales*, 402 U.S. 389, 401, 91 S. Ct. 1420, 28 L. Ed. 2d 842 (1971)). This review is deferential; the court must affirm the ALJ's factual findings if they are supported by substantial evidence on the record as a whole. *Id.* (citing *Estes v. Barnhart*, 275 F.3d 722, 724 (8th Cir. 2002); *Krogmeier v. Barnhart*, 294 F.3d 1019, 1022 (8th Cir. 2002) (citing *Prosch v. Apfel*, 201 F.3d 1010, 1012 (8th Cir. 2000)); *Kelley v. Callahan*, 133 F.3d 583, 587 (8th Cir. 1998) (citing *Matthews v. Bowen*, 879 F.2d 422, 423-24 (8th Cir. 1989)); 42 U.S.C. § 405(g) ("The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive. . . ."). Under this standard, "[s]ubstantial evidence is less than a preponderance but is enough that a reasonable mind would find it adequate to support the Commissioner's conclusion." *Krogmeier, id.*; *Weiler v. Apfel*, 179 F.3d 1107, 1109 (8th Cir. 1999) (citing *Pierce v. Apfel*, 173 F.3d 704, 706 (8th Cir. 1999)); accord *Gowell v. Apfel*, 242 F.3d 793, 796 (8th Cir. 2001) (citing *Craig v. Apfel*, 212 F.3d 433, 436 (8th Cir. 2000)); *Hutton v. Apfel*, 175 F.3d 651, 654 (8th Cir. 1999); *Wolf v. Shalala*, 3 F.3d 1210, 1213 (8th Cir. 1993).

Moreover, substantial evidence "on the record as a whole" requires consideration of the record in its entirety, taking into account both "evidence that detracts from the Commissioner's decision as well as evidence that supports it." *Krogmeier*, 294 F.3d at 1022 (citing *Craig*, 212 F.3d at 436); *Willcuts v. Apfel*, 143 F.3d 1134, 1136 (8th Cir. 1998) (quoting *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 488, 71 S. Ct. 456,

464, 95 L. Ed. 456 (1951)); *Gowell*, 242 F.3d at 796; *Hutton*, 175 F.3d at 654 (citing *Woolf*, 3 F.3d at 1213); *Kelley*, 133 F.3d at 587 (citing *Cline v. Sullivan*, 939 F.2d 560, 564 (8th Cir. 1991)). The court must “search the record for evidence contradicting the [Commissioner’s] decision and give that evidence appropriate weight when determining whether the overall evidence in support is substantial.” *Baldwin v. Barnhart*, 349 F.3d 549, 555 (8th Cir. 2003) (also citing *Cline, supra*).

In evaluating the evidence in an appeal of a denial of benefits, the court must apply a balancing test to assess any contradictory evidence. *Sobania v. Secretary of Health & Human Serv.*, 879 F.2d 441, 444 (8th Cir. 1989) (citing *Steadman v. S.E.C.*, 450 U.S. 91, 99, 101 S. Ct. 999, 1006, 67 L. Ed. 2d 69 (1981)). The court, however, does not “reweigh the evidence presented to the ALJ,” *Baldwin*, 349 F.3d at 555 (citing *Bates v. Chater*, 54 F.3d 529, 532 (8th Cir. 1995)), or “review the factual record *de novo*.” *Roe v. Chater*, 92 F.3d 672, 675 (8th Cir. 1996) (citing *Naber v. Shalala*, 22 F.3d 186, 188 (8th Cir. 1994)). Instead, if, after reviewing the evidence, the court finds it “possible to draw two inconsistent positions from the evidence and one of those positions represents the agency’s findings, [the court] must affirm the [Commissioner’s] decision.” *Id.* (quoting *Robinson v. Sullivan*, 956 F.2d 836, 838 (8th Cir. 1992), and citing *Cruse v. Bowen*, 867 F.2d 1183, 1184 (8th Cir. 1989)); accord *Baldwin*, 349 F.3d at 555; *Young v. Apfel*, 221 F.3d 1065, 1068 (8th Cir. 2000). This is true even in cases where the court “might have weighed the evidence differently.” *Culbertson v. Shalala*, 30 F.3d 934, 939 (8th Cir. 1994) (citing *Browning v. Sullivan*, 958 F.2d 817, 822 (8th Cir. 1992)); accord *Krogmeier*, 294 F.3d at 1022 (citing *Woolf*, 3 F.3d at 1213). The court may not reverse the Commissioner’s decision “merely because substantial evidence would have supported an opposite decision.” *Baldwin*, 349 F.3d at 555 (citing *Grebenick v. Chater*, 121 F.3d

1193, 1198 (8th Cir. 1997)); *Young*, 221 F.3d at 1068; see *Pearsall*, 274 F.3d at 1217; *Gowell*, 242 F.3d at 796; *Spradling v. Chater*, 126 F.3d 1072, 1074 (8th Cir. 1997).

On the issue of an ALJ's determination that a claimant's subjective complaints lack credibility, the Sixth and Seventh Circuits have held an ALJ's credibility determinations are entitled to considerable weight. See, e.g., *Young v. Secretary of H.H.S.*, 957 F.2d 386, 392 (7th Cir. 1992) (citing *Cheshier v. Bowen*, 831 F.2d 687, 690 (7th Cir. 1987)); *Gooch v. Secretary of H.H.S.*, 833 F.2d 589, 592 (6th Cir. 1987), cert. denied, 484 U.S. 1075, 108 S. Ct. 1050, 98 L. Ed. 2d. 1012 (1988); *Hardaway v. Secretary of H.H.S.*, 823 F.2d 922, 928 (6th Cir. 1987). Nonetheless, in the Eighth Circuit, an ALJ may not discredit a claimant's subjective allegations of pain, discomfort or other disabling limitations simply because there is a lack of objective evidence; instead, the ALJ may only discredit subjective complaints if they are inconsistent with the record as a whole. See *Hinchey v. Shalala*, 29 F.3d 428, 432 (8th Cir. 1994); see also *Bishop v. Sullivan*, 900 F.2d 1259, 1262 (8th Cir. 1990) (citing *Polaski v. Heckler*, 739 F.2d 1320, 1322 (8th Cir. 1984)). As the court explained in *Polaski v. Heckler*:

The adjudicator must give full consideration to all of the evidence presented relating to subjective complaints, including the claimant's prior work record, and observations by third parties and treating and examining physicians relating to such matters as:

- 1) the claimant's daily activities;
- 2) the duration, frequency and intensity of the pain;
- 3) precipitating and aggravating factors;
- 4) dosage, effectiveness and side effects of medication;
- 5) functional restrictions.

Polaski, 739 F.2d 1320, 1322 (8th Cir. 1984). *Accord Ramirez v. Barnhart*, 292 F.3d 576, 580-81 (8th Cir. 2002).

IV. ANALYSIS

Newkirk argues the ALJ erred in discounting the opinions expressed on the mental health questionnaire completed by Nurse-Practitioner Kitten, and in failing to include all of Newkirk's limitations – as expressed on that questionnaire – in the hypothetical question posed to the VE. Indeed, the court finds the outcome of this case is largely dependent on the weight given to the opinions expressed by the treatment team at North Central Iowa Mental Health Center, including Dr. Jordison, Ms. Kitten, and Mr. Burr, who facilitated the depression support group in which Newkirk participated. If the treatment team's opinions are given great weight, and the limitations they assigned to Newkirk are included in a hypothetical question, then based on the VE's testimony, Newkirk would be wholly unable to work in competitive employment and would be disabled. On the other hand, if the ALJ was correct in giving little weight to the treatment team's opinions, then the evidence would not support Newkirk's subjective complaints regarding her limitations, and the VE's testimony would support a finding that Newkirk could work in unskilled, low-stress jobs.

The ALJ specifically found that the opinions of Dr. Jordison and Ms. Kitten were “not medical opinions and are therefore not entitled to much deference.” (R. 25, citing *Krogmeier v. Barnhart*, 294 F.3d 1019, 1023 (8th Cir. 2002)) Notably, *Krogmeier* stands for the proposition that even a treating physician's opinion is not controlling on the issue of whether a claimant can be gainfully employed. The *Krogmeier* court held such an opinion is one of statutory application that is reserved to the Commissioner's discretion. *Id.* (citations omitted). The ALJ failed to distinguish, however, between the treatment

team's opinion that Newkirk was unable to work, and their overall *medical opinions* regarding her condition, treatment progress, work-related mental functional abilities, and prognosis. In this regard, the court finds the ALJ failed to give proper weight to the opinions of the mental health treatment team, which enjoyed a very long-term treatment relationship with Newkirk.

Both the ALJ, in his decision, and the Commissioner, in her brief, seize upon what they view as inconsistencies between Newkirk's reports to the Social Security Administration and her reports to her therapists. (See, e.g., R. 30 & Doc. No. 10 at 24, both citing R. 608) However, Newkirk did not testify, nor has she represented to the SSA, that she has been continually and consistently unable to perform household tasks, do grocery shopping, and keep up with her basic needs. The SSA's regulations recognize that mental disorders may encompass a level of functioning that "may vary considerably over time." 20 C.F.R. Pt. 404, Subpt. P., App. 1, § 12.00(D)(2). An individual's level of functioning "at a specific time may seem relatively adequate or, conversely, rather poor." *Id.* Proper evaluation of an individual's impairment must take into account variations in the individual's level of functioning in arriving at a determination of severity over time. *Id.* "Thus, it is vital to obtain evidence from relevant sources over a sufficiently long period prior to the date of adjudication to establish [the individual's] impairment severity." *Id.* The arguments of the ALJ and the Commissioner in the present case ignore these instructions in pointing to isolated instances when Newkirk's level of functioning improved over the long course of her mental health treatment.

The SSA's regulations further recognize the problems inherent "in evaluating mental impairments in individuals who have long histories of . . . prolonged outpatient care with supportive therapy and medication." *Id.*, § 12.00(E). The regulations provide as follows:

For instance, if you have chronic organic, psychotic, and affective disorders, you may commonly have your life structured in such a way as to minimize your stress and reduce your symptoms and signs. In such a case, you may be much more impaired for work than your symptoms and signs would indicate. The results of a single examination may not adequately describe your sustained ability to function. It is, therefore, vital that we review all pertinent information relative to your condition, especially at times of increased stress. We will attempt to obtain adequate descriptive information from all sources that have treated you in the time period relevant to the determination or decision.

Id. The regulation's directions are particularly relevant in evaluating the evidence in the present case. The record contains a large volume of evidence to support Newkirk's claim that when faced with the stress of competitive employment, she decompensates. Even when she stays at home and avoid stressful situations, she continues to suffer depressive symptoms and has difficulty remaining motivated to go about her daily routine. Although she experiences periods of improvement when she may be able to go out in public with her husband and function more adequately at home, any return of daily stressors causes a recurrence of her symptoms.

Notably, the court finds little support for most of the ALJ's cited reasons for discounting Newkirk's credibility. The ALJ relied on what he deemed to be a lack of truthfulness on Newkirk's part regarding her relationship with her boyfriend. The court does not find it unusual that a woman who has lived with a man for many years, and who has a grown child with the man, would have difficulty describing the relationship to others. It is unreasonable to suggest she lacks credibility because a psychiatrist reported Newkirk was married, a therapist reported she was common-law married, and Newkirk testified she was not married but simply had lived with her boyfriend for a long period of

time. (See R. 30) The ALJ also cites, as a reason to discount Newkirk's credibility, the following: "Fifth, the claimant testified that she tried to commit suicide after she was fired for stealing from her employer. She later testified that she was hospitalized for suicidal ideation." (*Id.*) The court fails to see any inconsistency in these two statements.

The ALJ discusses at some length Newkirk's financial dependence on her boyfriend, and the effect of that dependence on her application for benefits and her decision as to whether or not to stay in the relationship. The court finds nothing to impugn Newkirk's credibility in the fact that she was anxious to obtain a final decision on her application for benefits because it could affect her decision regarding her further living arrangements.

The court also finds no inconsistency in the fact that in November 2001, Newkirk indicated she was unable to squat, while in December 2002, she indicated she was able to squat. There is no indication by the ALJ of what happened during that thirteen-month period of time that would cause him to rely on her reported change in condition in discounting her credibility. The ALJ further relies on Newkirk's report at one time that she did little housework, and her report at another time that she kept up with her housework. As noted above, depression is a "moving target" when it comes to an individual's functional abilities over time, and her ability to keep up with her housework even for several months at a time does not contradict her statements at other times that she was basically nonfunctional due to her depression.

In the final analysis, the court finds the ALJ erred in failing to give controlling weight to the medical evidence from Newkirk's mental health treatment team. That evidence clearly demonstrates that Newkirk suffers from chronic, long-term depression that is debilitating to a degree that it prevents her from working. When presented with an individual with a fair ability to maintain attention for more than two hours at a time,

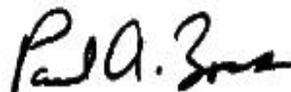
work in coordination with others, make simple work-related decisions, maintain a consistent pace, make routine changes in the workplace, carry out detailed instructions, set realistic goals, and ask simple questions or request assistance; and a poor ability to maintain regular attendance, complete a normal workday and work week, deal with normal work stress, and deal with the stress of semi-skilled and skilled work, the VE testified the individual would be unable to return to any of Newkirk's past relevant work, and would be unable to sustain full-time employment in the competitive market. The court finds the record contains ample evidence to support those restrictions on Newkirk's functioning for the period under consideration here, and therefore finds the record does not contain substantial evidence to support the ALJ's decision.

V. CONCLUSION

The court may affirm, modify or reverse the Commissioner's decision with or without remand to the Commissioner for rehearing. 42 U.S.C. § 405(g). In this case, where the record itself "convincingly establishes disability and further hearings would merely delay receipt of benefits, an immediate order granting benefits without remand is appropriate." *Cline*, 939 F.2d at 569 (citing *Jefferey v. Secretary of H.H.S.*, 849 F.2d 1129, 1133 (8th Cir. 1988); *Beeler v. Bowen*, 833 F.2d 124, 127-28 (8th Cir. 1987)); accord *Thomas v. Apfel*, 22 F. Supp. 2d 996, 999 (S.D. Iowa 1998). In this case, the court finds the ALJ's decision should be reversed, and this case should be remanded for calculation and award of benefits.

IT IS SO ORDERED.

DATED this 28th day of April, 2005.



PAUL A. ZOSS
MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT